Shortly stated, the principle of approbation and reprobation or doctrine of election as applied by the Federal Court was also applied by Arulanandom J. to this case which undoubtedly is a much stronger case than that decided by the Federal Court. Section 7 of the Ordinance makes void any attempt to contract out of the Ordinance if by such attempt the employee is deprived of his right to overtime wages for working overtime.

In the instant case it was not open to the appellant to say that he had been deprived of the benefits of the Ordinance having clearly admitted that he had been paid more than what he would get as overtime wages. This is so if the sum of $85/- a month is multiplied by the number of months from October, 1969 to November, 1972.

In view of the decision of the Federal Court I think the learned judge was right in deciding as he did in the instant case. I would, therefore, dismiss this appeal with costs.

Lee Hun Hoe C.J. (Borneo) and **Raja Azlan Shah F.J.** concurred.

Appeal dismissed.

Solicitors: *Ariffin & Co.; Ranjit, Thomas & Kula.*

PETER CHONG NGEN ONN & ORS. v. COL. ADAM BIN ABUBAKAR & ORS.

[F.C. (Suffian L.P., Raja Azlan Shah and Wan Suleiman F.JJ.) February 24, May 20, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 139 of 1976]

Administrative Law — Application for order of prohibition to prohibit court martial from proceeding with hearing — No power to interfere with matters of military conduct — Court has no jurisdiction to interfere even if court martial not convened in accordance with Rules of Procedure — Malay Regiment Enactment (F.M.S. Cap. 42), ss. 21, 22 and 23.

Armed Forces — Military court — Matters relating to military law — Civil rights of a soldier — Civil court has no jurisdiction to interfere even if court martial not convened in accordance with rules of procedure.

In this case the appellants, members of the armed forces, applied to the High Court for an order prohibiting the court martial from proceeding with the hearing of charges against them under the Malay Regiment Enactment. It was alleged that the court martial had no jurisdiction or had exceeded its jurisdiction and had acted contrary to the general law of the land and to the rules of natural justice. The application was dismissed in the High Court and the appellants appealed to the Federal Court.

Held, dismissing the appeal: (1) the court will not intervene in matters relating to military law prescribing rules for the guidance of officers;

(2) the court could only interfere with military courts and matters of military law in so far as the civil rights of a soldier might be affected;

(3) therefore even if it is shown that a court martial had not been convened in accordance with the Rules of Procedure the court had no jurisdiction to interfere.

Cases referred to:-

(1) *The King* v. *Army Council, ex parte Ravenscroft* [1917] 2 K.B. 504.

(2) *R.* v. *Secretary of State, ex parte Martyn* [1949] 1 All E.R. 242.

The following authorities were also cited in argument: *Crane* v. *Deputy Public Prosecutor* [1921] A.C. 299; 15 Cr. App. R. 23, 183, *R.* v. *Dennis & Parker* 18 Cr. App. Rep. 39; [1924] 1 K.B. 867, *Scott* v. *Scott* [1913] A.C. 417, *Edwards* v. *East India Co.* (1840) 3 Ky. 6, *A. Gabriel & Anor.* v. *Public Prosecutor* [1957] M.L.J. 83, *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171, 205, and *Tan Chwee Geok & Anor.* v. *Khaw Yen-Yen & Anor.* [1975] 2 M.L.J. 189.

FEDERAL COURT.

Datuk P. Suppiah for the appellants.

Tam Kam Weng (Senior Federal Counsel) for the respondents.

In the court below *Datuk P. Suppiah* appearing for the applicants and *S. Isaacs* (Federal Counsel) for the respondents, the following judgment was delivered on September 24, 1976:

Abdul Hamid J.: This is an application by way of Notice of Motion by four applicants, namely, Peter Chong Ngen Onn, Salleh bin Hussein, Taib bin Mohamed and Edwin Godfrey Johnson for the following orders and directions —

1. an Order of Prohibition to prohibit the Court Martial or its President and Members from proceeding further with the hearing of the charges against the first, second, third and fourth applicants under sections 23(ii), 22(i)(a) and 21(1) respectively of the Malay Regiment Enactment (F.M.S. Cap. 42) upon the grounds set forth in the statement accompanying the application; and
2. that the proceedings before the Court Martial be stayed until after the determination of this Motion.

Grounds upon which the relief is sought are as follows —

(A) That the Court Martial has no jurisdiction —

(1) to hear all four charges or any of them preferred in separate charge sheets as the Convening Officer failed in the convening order to direct that the applicants be tried on those charges as required by rule 48(1)(b) of the Armed Forces (Court Martial) Rules of Procedure, 1976;

(2) to try all the applicants jointly (as was ordered by the Court Martial) as —

(a) The Convening Officer did not direct that the applicants be tried jointly as required by R.P. 48(1)(d);

(b) The Convening Officer had placed the four charges on four separate charge sheets with a remark "to be tried by a Court Martial" on each charge sheet; and

(c) The offences against each of the applicants did not arise out of the same transaction.

(3) to try the applicants as they had not been remanded for trial by the said Court Martial by their Commanding Officer;

(4) to arraign all the applicants before deciding whether they were to be tried jointly on the four charges.

(B) That the Court Martial exceeded its jurisdiction —

(1) When it proceeded to hold part of the trial in camera as to do so would fall outside the ambit of rule 8 of the Rules of Procedure or section 110(2) of the Armed Forces Act;

(2) When the Judge Advocate alone heard the argument as to whether the first applicant was entitled to be present in court when the second and third applicants were giving evidence as to condonation as this did not come within R.P. 104(1).

(C) That the Court Martial exceeded its jurisdiction and acted wholly contrary to the general laws of the land and natural justice —

(1) When it asked the first applicant to leave the court when second and third applicants were giving evidence with regard to their offences being condoned by the first applicant as their Commanding Officer as this contravened R.P. 7 and section 110(1) of the Armed Forces Act;

(2) If it continues with the trial of the first applicant as out of 27 statements making up the abstract of evidence relating to the charge against the first applicant, 7 of them, namely, the statements of Major Mohd. Yasin, Capt. Tan Too Kee, Abdul Aziz, Cpl. Gnanaretnam, L/Cpl. Wan Majid, Cpl. Mustafa and Rosli were taken prior to the first applicant's Commanding Officer charging him as this violates rule 7 of the repealed Rules of Procedure (Army) 1956 of the British Army as applied to the Malaysian Army by the Federation Military Forces (Procedure) Rules, 1957 (L.N. 51/57);

(3) If it continues with the trial of the first applicant as out of 27 statements making up the abstract of evidence relating to the charge against him, 7 of them, namely, Major Jamaluddin, Capt. Abdul Bahar, Sgt. Said, Mohd. Annuar, Wan Mohd. Noor, Lawrence Arokiasamy and Sudin do not relate to the charge on which the first applicant was arraigned by the Commanding Officer, the inclusion of the same therefore violates R.P. 33(1), 36, 38(1)(c) and 48(1)(i) and will also prejudice a fair trial;

(4) If it continues with the trial against the first applicant as the charge against him is not correct in law and has not been framed in accordance with rule 40 of the Rules of Procedure in that the following are not stated —

(a) The exact date of the offence;

(b) Name of the person who informed of the deficiency of stores;

(c) Details and particulars of deficiency;

(d) How or in what manner first applicant failed to act;

(e) Nature of duty imposed on the first applicant;

(f) The paragraph of Procedure No. 5 Part 3 of Ator Cara Perentah, Perentah Depot, the first applicant failed to comply with;

(g) The paragraph of the Armed Forces Order Volume III Chapter 3, section 6 which is to be read in conjunction with the said procedure.

Further the words "failed to act" in the charge do not appear in the section of the MRE under which the first applicant is charged and therefore the offence is unknown to law. Also the charge states that the first applicant "omitted to make a report" but particulars of the charge say nothing about any report and as such the charge as framed discloses no offence.

(5) When it allowed the Prosecutor to amend the charge against the first applicant by adding "$119,315.35" after the figure "$1,500" as R.P. 44(1) only allows the court to make minor amendments;

(6) If it continues with the trial against the second applicant as the charge is not correct in law and has not been framed in accordance with rules of procedure, in particular rule 40, in that —

(a) The section under which he is charged relates to "knowingly making a false statement" whereas the charge states that he "signed documents knowing that they contained false statements", therefore the charge discloses no offence known to law;

(b) It merely says "diverse duties" and did not state all the duties;

(c) It gives no details of the statements.

(7) If it continues with the trial against the third applicant as the charge is not correct in law and has not been framed in accordance with rules of procedure, in particular rule 40 in that —

(a) "Signing a report knowing that it contained a false statement" is not an offence as the offence under section 21(i)(a) of MRE is "knowingly making a false statement", therefore the offence is unknown to law;

(b) As details of "certain items in stock" have not been specified and that in whose stock it has not been mentioned;

(c) The type of report has not been mentioned.

(8) If it continues with the trial of the fourth applicant as the charge against him is not correct in law and has not been framed in accordance with rules of procedure, in particular rule 40, in that —

(a) The statement of the offence has not stated how he made away, e.g. by pawning, selling, destruction, etc.;

(b) It did not state the date of the offence;

(c) The words "unlawfully authorised" appearing in the charge do not appear in the section and therefore the offence is unknown to law;

(d) The charge has not given details of "parts" nor where the parts were to be removed and to whom the parts were to be given away;

(e) The charge has not stated particulars of request, also whether the request was made orally or in writing.

(D) That the Court Martial has no jurisdiction to try second and third applicants as the offences against them had been condoned by their Commanding Officer in accordance with section 146 of the Armed Forces Act, 1972.

It is revealed that the Court Martial convened to try the applicants was held on July 1, 17, 19, 20 and 21, 1976. Encik Suppiah counsel for all the four applicants submitted that, in that event, the governing laws and rules of procedure would be —

(a) Malay Regiment Enactment F.M.S. Cap 42 (shall be called MRE) which is based on the old British Army Act to be found in the Manual of Military Law, 1951 (shall be called the Green Book);

(b) The Rules of Procedure (Army), 1956 (shall be called the repealed rules of procedure) of the British Army applied to the Malaysian Army by virtue of the Federation Military Forces (Procedure) Rules, 1957 (L.N. 51/57) to be found at page 571 onwards in the Manual of Military Law Part I, 1956 (shall be called the Red Book);

(c) The Armed Forces Act, 1972 (shall be called the present Act) which came into force on June 1, 1976; and

(d) The Armed Forces (Court Martial) Rules of Procedure, 1976 (shall be called the present Rules of Procedure) which came into force on June 1, 1976 depending on the point of time when certain actions were taken with regard to the offences.

In order to determine the questions posed by the applicants it may be useful to consider some of the general principles governing prohibition. It seems clear that the High Court may prohibit a military court from continuing with proceedings thereon where the proceedings are in excess of the court's jurisdiction or where they contravene the laws of the land (see Halsbury's Laws of England 4th edition page 137 paragraph 128). It is also clear that the order does not lie to correct the course, practice or procedure of any inferior tribunal or a wrong decision on the merits of the proceedings (see Halsbury's 4th edition page 138 paragraph 130). Prohibition lies where — (a) there is an excess of or absence of jurisdiction; and where there is a departure from the rules of natural justice. The order is as of right and not a matter of discretion where the defect as to jurisdiction is apparent on the face of the proceedings (see Halsbury's 4th edition page 140 paragraph 131). It is, however, a matter of discretion where the defect is not patent. In that case, the court may, depending on the circumstances of each case, decline to intervene. But "where a clear excess of jurisdiction by an inferior tribunal is brought to the notice of the court, and a prohibition is necessary in order to enforce public order in the administration of the law, the court is bound to grant it, at least where the applicant has a personal interest in the outcome of the proceedings. It is otherwise if there is a doubt in fact or law whether the inferior tribunal is exceeding its jurisdiction or acting without jurisdiction" (see Halsbury's 4th edition page 140 paragraph 132).

Turning now to the grounds raised by the applicants, I propose to deal with them in the order I have set out above. As for ground (A)(1), Encik Suppiah submitted that although the present Rules of Procedure (R.P.) 48(1)(b) requires the Convening Officer to direct upon what charges the accused is to be tried, there is no such direction. And by the same token, the Convening Officer did not direct whether the accused are to be tried jointly or separately although the present R.P. 48(1)(d) requires the Convening Officer to do so if there are more than one accused.

On examination of the affidavits and the exhibits filed, I cannot honestly say that there is any merit in the applicants' contention. To my mind, the Convening Officer clearly directed the charges upon which all the four applicants were to be tried. These charges are revealed from exhibits "PCNO 1", "Sbh 2", "Tbm 3" and "Egj 4" attached to the joint affidavit of the four applicants.

There is a similar direction in respect of every charge to the effect that each applicant is "to be tried by a Court Martial." All the directions were issued on the same date. In my view there is sufficient compliance not only with the present R.P. 48(1)(b) but also with R.P. 48(1)(c), i.e. in respect of the order the applicants were to be tried, in the instant case, to mean by a single Court Martial. This is evident from exhibit Mbs2 dated June 17, 1976 attached to Major General Datuk Mahmood's affidavit as well as the subsequent notifications of Court Martial trial served on each of the applicants (see Mbs3, Mbs4, Mbs5 and Mbs6).

Apart from R.P. 48(1)(c) counsel urged the court to consider R.P. 39, 41(1), 51(7), 58(1) and 64. I have very carefully examined these rules of procedure. R.P. 39 speaks of matters a charge sheet should contain whilst R.P. 41(1) is in the nature of a directory provision permitting separate offences committed by a number of accused to be charged in the same charge sheet and quite clearly cannot apply to the circumstances of the present case. R.P. 51(7) speaks of notice to accused of joint trial and of the right of the accused to claim to the convening authority before trial to be tried separately. This sub-rule does not appear to be relevant to the present case. R.P. 58(1) speaks of order of trials. The procedure was followed in the present case. Finally R.P. 64 is a provision which allows accused charged jointly to apply for separate trials. This question did not arise at all in the present case.

As for the applicants' contention that the offences against each of them did not arise out of the same transaction, the question was not seriously argued by counsel for the applicants. In any event, it is clear that this is not a matter which this court can properly determine by looking at the charges alone in the absence of full facts of the case.

I have, I think, dealt with grounds, (A) (1) and (A) (2)(a), (b) and (c). As for ground (A) (3) it is alleged that the applicants had not been remanded for trial and this fact had not been stated in the holding charge sheets. Reference was made to section 96(3) of the present Act which states that "If, after investigation, any charge is not dealt with summarily as aforesaid the accused shall be remanded for trial by the Court Martial." Encik S. Issacs Federal Counsel appearing on behalf of the respondents, pointed out that the applicants had properly been remanded. Upon recommendations contained in exhibits Mbs7, 8, 9 and 10, a convening order for a Court Martial was accordingly issued (see Mbs2). In consideration I find that there had been sufficient compliance with section 96(3) of the present Act and also rule 18 of the repealed Rules of Procedure in that the higher authority had properly remanded the applicants for trial by Court Martial (see Mbs3, 4, 5 and 16). At the same time the notice convening the Court Martial (Mbs2) was issued by Major General Datuk Mahmood. In my judgment no reason exists for me to hold that there has been a violation of any rule of procedure. Ground (A) (4) also discloses no merit whatever. Col. Adam the President of the general Court Martial appointed to try the four applicants deposed in his affidavit that the question of a joint trial was determined before the four applicants were arraigned. There was an application by the first applicant during the preliminary objection for separate trial and the court decided that he be jointly tried with the other three. The court also decided, in respect of each of the other three applicants, before arraignment, that they would also be jointly tried. In any event, the question essentially was one of procedure and even assuming there was a procedural error which I have not so found, this is not a case which the order of prohibition should properly lie.

The next ground (B) (1) relates to trial in camera. There is no substances in the applicants' contention. It seems clear in the light of section 110(2) of the present Act and R.P. 8 of the present rules that the Court Martial, on the ground that it is necessary or expedient in the interest of the administration of justice, is empowered to sit in camera. It is a discretionary power and such power was in the circumstances of this case, properly exercised.

Ground (B) (2) is connected with ground (C) (1). This is again a question of procedure. Encik Isaacs argued that the matter falls within the ambit of R.P. 104(1). It was a plea in Bar and in that case the President may direct that the point at issue be determined by the Judge Advocate alone. There are in fact two issues here, firstly, whether it was wrong for the Judge Advocate to hear the arguments alone, and, secondly, whether it was proper for the evidence with regard to condonation by the second and third applicants to be given in the absence of the first applicant. As for the former the point raised was in fact a plea in Bar and as such it fell within the ambit of R.P. 104 and consequently the Judge Advocate could properly sit alone. As regards the latter sub-rule (3) of R.P. 104 provides that in the event of the Judge Advocate sitting alone in accordance with R.P. 104 section 110 of the present Act shall, inter alia, apply to the proceedings before the Judge Advocate sitting alone. Section 110(1) of the present Act requires a Court Martial to sit in the Open Court and in the presence of the accused. In the proceedings before the Court Martial the four applicants were the accused and technically the court had erred when it heard the testimony of the second and third applicants in the absence of the first applicant. Nevertheless, I find that such an error had not really occasioned a failure of justice on the part of the first applicant. It was purely technical and such error was essentially one of procedure and is insufficient to warrant an issue of an order of prohibition.

Grounds (C) (2) and (C) (3) relates to abstract of evidence of certain persons unrelated to the charge on which the first applicant was arraigned. The first applicant's main contention is that it is contrary to law to include statements in the abstract taken before the first applicant was charged by his Commanding Officer. Encik Isaacs drew my attention to R.P. 36 of the present rules and rule 10 of the repealed rules. In consideration I find no substance in the first applicant's argument. Clearly there has not been any violation of R.P. 33, 38(1)(c) and 48(1)(i).

Turning now to ground (C) (4) which relates to the charge preferred against the first applicant, I find that the manner in which the charge has been framed has left much to be desired, but to go so far as to say that the charge against the first applicant is not correct in law and the Court Martial has therefore exceeded its jurisdiction and acted contrary to the general laws of the land, is something which I am constrained to disagree. I have examined the charge sheet in respect of the first applicant and it is apparent that the charge has been framed so as to closely comply with R.P. 40 of the present rules. The charge is divided into two parts, a statement of the offence with which the first applicant is charged and a statement of the particulars of the act, omission, etc. Sufficient details to enable the first applicant to know exactly what he is charged with have been included. The period during which the offence is alleged to have been committed has been stated. To my mind this is sufficient compliance with R.P. 40(3). The first applicant's contention seems to suggest that particulars stated in the ground raised ought to have been included. In my view, the particulars were strictly evidence which should normally be introduced during the course of the trial and are not matters which must necessarily be set out in the charge. The first applicant's contention that although the words "failed to act" were given in the charge they do not appear anywhere in the statement of the offence and therefore the offence was unknown to law and cannot be sustained as it is apparent from the charge that these words were only used in the particulars of the offence. Similarly, the first applicant's contention that although the words "omitted to make a report" appear in the statement of offence, the particulars of the charge make no mention of any report, cannot also be sustained as this is again a question of evidence which the prosecution shall have to adduce to show what duty has been imposed on the first applicant by Procedure No. 5 Part III of Ator Cara Perentah, Perentah Depot. Moreover, it may be erroneous for this court not to have regard to R.P. 42 of the present Rules which provides that "In the construction of a charge sheet or charge there shall be presumed in favour of sup-

porting it every proposition which may reasonably be presumed to be impliedly included, though not expressed therein, and the statement of the offence and the particulars of the offence shall be read and construed together."

In ground (C) (5) the first applicant contended that the amendment of the charge under R.P. 44(1) could only be done by the court. I do not think that that is the proper construction that should be placed upon R.P. 44(1). While there is no doubt that the power lies with the court with the concurrence of the Judge Advocate it is inconceivable that the power may only be exercised solely at the instance of the court alone and it could not be done even at the request of or on application by the prosecutor. The rule I think is sufficiently wide to cover both an amendment by the court with the concurrence of the Judge Advocate either of its own motion or at the request of or on application by the prosecution if it so appears to the court that it is desirable in the interest of justice to make any addition to, omission from, etc. if such addition, omission, etc. can be made without unfairness to the accused.

Ground (C) (6) is substantially similar to ground (C) (4) except that ground (6) relates to the second applicant. I quite agree, indeed I do find that neither the statement of the offence nor the particulars of the acts constituting the offence has been accurately set out, however, the second applicant could not have been misled into thinking that the charge against him was for signing documents which he knew contained false statements. Indeed the statement of the offence and the particulars do support the proposition that he was a privy to the making of a false statement. Again construed in the light of R.P. 42 the inaccuracy in the description of the statement of the offence and the particulars cannot be held to affect the court's jurisdiction. In passing I would add that the relevant section as well as the subsection and paragraph of the offending section have been specifically set out.

The second applicant's contention that he has not been given details of the false statement cannot be upheld for the simple reason that it tantamounts to supplying prosecution evidence before trial.

Ground (C) (7) relates to the charge against the third applicant. It is in effect a contention similar to that raised in ground (C) (6) and the views I have expressed earlier shall equally apply. The same would apply to ground (C) (8).

In addition to what I have stated earlier I would add that in regard to ground (C) (4), (C) (6), (C) (7) and (C) (8), it is my finding that R.P. 62 allows an accused to object to the charge on the ground that it is not correct in law or is not framed in accordance with the rules. There is no allegation in the joint affidavit of the applicants that an objection to that effect was made. Since the applicants had not availed themselves of the course open to them before the Court Martial, I do not think it is open to them to rely upon these grounds to support their application.

To conclude, may I at this juncture observe that the contentions which the applicants have raised to support their application, apart from those I have just referred to, relate mainly to matters of procedure and they do not seem to constitute valid grounds to prima facie establish that the Court Martial had acted either in absence or in excess of jurisdiction to merit consideration for the issue of Order of Prohibition. Encik Isaacs has drawn my attention to certain passages in Bindra on the Interpretation of Statutes and General Clauses third edition pages 157/160 and in particular it is pertinent to note that at page 159 there is this passage quoted by the learned author from the celebrated dictum of Lord Hobhouse to the effect that "... it was true that the court made a sad mistake in following the procedure adopted, still in so doing the court was exercising its jurisdiction; and to treat such an error as destroying the jurisdiction of the court was calculated to introduce great confusion into the administration of the law."

In the instant case, it is apparent that the crux of the application evolves around the question of jurisdiction and in this regard, I conceive that the court should interfere where an inferior court, having authority to inquire into a question which "went to its jurisdiction" decided wrongly. In such a case, the court may be said to have acted without or in excess of its jurisdiction and prohibition may lie. On the other hand, questions of procedure and defects of charges such as those raised in the present case cannot be said to be questions which went to the court's jurisdiction and wrong decisions which relate essentially to questions of procedure cannot therefore form the basis for the issue of Order of Prohibition.

In the circumstances of this case, it is my judgment that no valid grounds exist for prohibition to lie and I would therefore dismiss this application with costs.

The applicants appealed to the Federal Court. The Federal Court heard the appeal on February 24, 1977. The Federal Court delivered judgment on May 2.

Suffian L.P. (read by Wan Suleiman F.J.): The four appellants, members of the armed forces, were brought before a court martial on July 1, 17, 19, 20 and 21, 1976, and charged with offences under sections 23(ii), 22(i)(a), 22(i)(a) and 21(i) respectively of the Malay Regiment Enactment (F.M.S. Cap. 42). They applied to the High Court for an order prohibiting the court martial from proceeding with the hearing of the charges, on various grounds which may be summarized as follows:

(A) the court martial had no jurisdiction;

(B) the court martial exceeded its jurisdiction; and

(C) the court martial acted contrary to the general law of the land and to the rules of natural justice.

Their application was unsuccessful and they appeal to this court.

In a long and careful judgment the learned judge before whom the application came, considered that the complaints all related to procedure and defects in the charges. He concluded: —

"... questions of procedure and defects of charges such as those raised in the present case cannot be said to be questions which went to the court's jurisdiction, and wrong decisions which relate essentially to questions of procedure cannot ... form the basis for the issue of prohibition."

With all due respect to Datuk Suppiah who appeared on behalf of the appellants I do not think that there is merit in this appeal, since the law is that the court will not intervene in matters relating to military law prescribing rules for the guidance of officers. It was so held in *The King* v. *the Army Council, Ex parte Ravenscroft.*[1] By regulations made under section 70 of the Army Act in the United Kingdom for holding military courts of inquiry, it is provided that previous notice should be given of the time and place of the meeting of a court of inquiry, and of all adjournments of that court, to all persons concerned in the inquiry; and that whenever an inquiry affects the character or military reputation of an officer, full opportunity must be afforded to the officer of being present throughout the inquiry. An officer whose conduct was brought before a court of inquiry by the order of a general officer in command, complained that the above regulations had not been complied with, and that as the result of evidence given before the court he had been ordered by the Army Council to revert to half-pay. He applied to the Army Council, who refused to reopen the matter. He applied for mandamus to command the Army Council to cause the court of inquiry to reassemble to hear and determine the case according to law. His application was rejected by the Divisional Court. Viscount Reading C.J. at pages 509, 510 and 511 said:

"It is to be observed that the complaint of the [applicant] before this court is that he had no notice of the reassembly of the court of inquiry, and therefore no opportunity of cross-examining the witnesses and giving his own explanation. These matters would be very relevant if we were considering the procedure of a civil court. He relies on the Regulations for Courts of Inquiry which, as he says, have been infringed.

... It appears to me that this is a military matter. The [applicant] was under military law. His complaint, if any, is against his superior officer who directed the convening of the court of inquiry and the officer who in his view wronged him by not giving him a proper opportunity of presenting himself on the last two occasions when the court of inquiry met."

The learned Chief Justice dismissed the application because of the general principle which he stated earlier on during his judgment at page 508:

"... I have no doubt that this court has no power to interfere with matters of military conduct and purely military law affecting military rules for the guidance of officers or discipline generally."

In *R.* v. *Secretary of State for War, Ex parte Martyn*[2] the Divisional Court said that the court could only interfere with military courts and matters of military law in so far as the civil rights of a soldier might be affected, and, therefore, if a court martial had not been convened in accordance with the Rules of Procedure the court had no jurisdiction to interfere. Lord Goddard C.J. said at page 243:

"If the court martial in the present case has not observed the proper rules of procedure, that is a matter for the convening officer, and, if necessary, the Judge Advocate General to deal with, but it is not a matter for this court, which can only interfere with military courts and matters of military law in so far as the civil rights of the soldier or other person with whom they deal may be affected. This application really amounts to asking us to decide that the members of the court martial were wrong in holding that they had been convened in accordance with the Rules of Procedure, but that is purely a matter of military law and procedure and not one to interfere with which this court has any jurisdiction."

I would therefore dismiss this appeal, with costs. The appellants' deposit to be paid to the respondents against their taxed costs.

Raja Azlan Shah and **Wan Suleiman F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Suppiah & Singh.*

ALAGAPPA CHETTIAR v. FREEDAM SHAH BIN CHE YEAM

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) June 3, 1977]

[Alor Star — Federal Court Civil Appeal No. 51 of 1976]

Land Law — Charge to moneylender — Memorandum of Agreement — Memorandum of charge — Whether memorandum of agreement a promissory note — Application for sale — Payment of interest — Stamp Ordinance, 1949, ss. 2, 41, 47 and 52 — Moneylenders Ordinance, 1951, s. 16 — National Land Code, s. 256.

Stamp — Promissory note — Stamp Ordinance, 1949, ss. 2, 41, 47 and 52.

The respondent had charged his shares in certain land to the appellant as security for a loan. The appellant was a moneylender and a memorandum of agreement and a memorandum of charge were executed. On failure of the respondent to pay the appellant applied for order of sale. The main grounds of objection raised were (1) that no authenticated copy of the memorandum of agreement was given to the respondent as required under section 16 of the Moneylenders Ordinance, 1951; (2) that the claim was statute-barred by the Limitation Ordinance 1953; (3) that the memorandum or agreement was not duly stamped as required by section 41 of the Stamp Ordinance, 1949.

The learned trial judge rejected the first objection as he held that as the respondent had acknowledged receipt of a copy of the memorandum authenticated by the borrower the onus was on him to rebut the presumption and he had failed to do so. The learned trial judge also rejected the second contention as he held that the period of limitation to recover money on a charge was twelve years. He held however that the memorandum of agreement was a promissory note and as it was not duly stamped before execution it was not admissible in evidence. He also held that the charge did not appear to have been signed by the appellant at the time of execution and the memorandum of charge did not specifically provide for interest after the day appointed for repayment. He therefore dismissed the appellant's claim. The appellant appealed.

Held, allowing the appeal: (1) the memorandum of agreement was not a promissory note and therefore was not required to be stamped before execution to be admissible;

(2) the memorandum of agreement and the memorandum of charge must be taken together and there was no omission to state the date of the loan;

(3) the charge was in fact executed by the appellant at the time of the execution;

(4) although the charge did not provide for interest after the date appointed for repayment, there was a clear provision to that effect in the memorandum of agreement.

Cases referred to:-

(1) *Boor Singh* v. *Abdul Majeed* [1967] 1 M.L.J. 16.

(2) *Abirami Ammal & Anor.* v. *M.S.M.M. Meyappa Chettiar* [1959] M.L.J. 149.

(3) *Mortgage Insurance Corporation Ltd.* v. *Commissioners of Inland Revenue* (1888) 21 Q.B.D. 352, 357, 358.

(4) *Brown Shipley & Co.* v. *Commissioners of Inland Revenue* [1895] 2 Q.B.D. 598.

(5) *Arumugam* v. *Leonard* [1936] M.L.J. 252.

(6) *Suchait Singh* v. *Shir Ali Khan* [1939] M.L.J. 28.